

# POPULATION RESEARCH INSTITUTE

— Founded In 1989 by Fr. Paul Marx, O.S.B. —

Fr. Paul Marx, O.S.B.  
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April 7, 2009

Federal Election Commission  
999 E. Street, N.W.  
Washington, D.C. 20463

Dear Sir:

This cover letter conveys our enclosed response in the case of MUR #6173.  
Thank you for your attention to this matter.

If any questions arise about our submission, please contact me at 540-631-5168.  
Our local telephone number is 540-622-5240.

Sincerely yours,

Steven W. Mosher  
President  
Population Research Institute

Encl.: Response of Population Research Institute to MUR # 6173

PRI  
1180 Progress Drive  
Suite 2D  
P.O. Box 1559  
Front Royal, VA 22630  
USA

TEL: (540) 622-5240  
FAX: (540) 622-2728  
EMAIL: pri@pop.org  
WEB: www.pop.org

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BEFORE THE FEDERAL ELECTION COMMISSION

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COUNSEL

2009 APR -9 P 2: 23

RE: Response of Population Research Institute to MUR # 6173

I am responding on behalf of Population Research Institute, Inc. (hereunder PRI) to the complaint filed by Catholics for a Free Choice alleging that an October 30, 2008 edition of PRI's *Weekly Briefing* constituted an impermissible corporate expenditure.<sup>1</sup>

The Commission should find no reason to believe that PRI's publication of the newsletter edition constituted a violation of the Federal Election Campaign Act (FECA) for two independently sufficient reasons. First, the publication did not constitute an expenditure because it is not a "general public political communication," and, second, the publication is exempt under the FECA "press" exemption and related Commission regulations.<sup>2</sup> Even if the publication were not otherwise exempt, the Commission should dismiss the complaint due to the de minimus nature of the costs involved.

Though it is not relevant to the Commission's legal determination, I note that the complaint was filed by an organization ideologically opposed to PRI's mission. Complainant's protestations of concern for Federal election law should be taken with a grain of salt. The Commission's speedy disposition of this complaint would serve the useful purpose vindicating the rights of Americans to comment on political candidates via the Internet. *See* MUR 5928, *Kos Media, LLC, Factual and Legal Analysis*.

<sup>1</sup> The complaint did not allege that the publication was a "contribution," but for the record, there was no communication between PRI and any candidate, political committee, or political party regarding the newsletter at issue.

<sup>2</sup> PRI also does not concede that the publication complained of contained "express advocacy." Because the publication is exempt regardless of content, we will not pursue this more complex argument at this time.

## LEGAL ANALYSIS

### **I. THE WEEKLY BRIEFING AT ISSUE WAS NOT A "PUBLIC COMMUNICATION," AND THEREFORE NOT REGULATED BY THE FECA.**

A public communication is defined to include specified media (excluding the Internet) and "any other form of general public political advertising." Commission regulations specifically exclude Internet communications, except for those placed for a fee on another person's web site, from the category of general public political advertising. 11 C.F.R. 100.26. Commission regulations further use the term "general public" to distinguish permissible from impermissible corporate communications. 11 C.F.R. 114.4(a), (c). Communications not made to the "general public" are simply not regulated. Under this scheme, "most on-line political advocacy [is] unregulated." MUR 5642, *George Soros, Statement of Reasons of Commissioner Ellen L. Weintraub* at 2 (concluding that no independent expenditure report is required for posting on a person's own web site because such postings do not constitute expenditures).

The *Weekly Briefing* is an Internet communication distributed exclusively by e-mail and web posting. The *Weekly Briefing* is posted on PRI's own web site, and is not placed for a fee on another person's web site.

Because the *Weekly Briefing* is an Internet and e-mail communication posted on PRI's own web site (and not for a fee on another person's web site), publication and dissemination of the *Weekly Briefing* does not constitute an expenditure. Because the publication is exempt from the definition of "expenditure," it cannot constitute an impermissible corporate expenditure.

### **II. THE WEEKLY BRIEFING QUALIFIES FOR THE "PRESS" EXEMPTION**

Commission regulations also exclude from the definition of expenditure the cost of any commentary or editorial on a web site, "including any Internet or electronic publication," so long

as it is not controlled by a candidate, political party or political committee. 11 C.F.R. 100.132. The Commission has traditionally applied the press exemption, including Internet publications, in a two step process: inquiring whether the entity at issue is a qualified press entity and whether the activity at issue was part of the entity's press function. Advisory Opinion 2005-16, *Fired Up!* at 4; MUR 5928 at 4.

No political party, political committee or candidate controls PRI or its *Weekly Briefing*.

**A. PRI is a qualified press entity as defined by FEC precedents.**

PRI is a research organization dedicated to publishing information to debunk population myths, expose misleading claims and programs, emphasize the value of people, promote pro-family attitudes and encourage programs to help the poor. *PRI Mission Statement*: <http://www.pop.org/20090117801/our-mission>. PRI pursues this mission principally through research and publication. PRI's publications include two regular (periodical) publications, the *Weekly Briefing*, published since 1999 and *PRI Review*, published since 1996. In addition, PRI publishes investigative reports, in-depth reports, and government documents. Though our activities are principally on the Internet, I act as the equivalent of a publisher and Mr. Mason and various staff members and volunteers act as researchers, writers and editors. MUR 5928 at 5. PRI's information gathering, publication, and advocacy activities place it squarely within the statute's provision for news stories, editorials, and commentaries, 2 U.S.C. § 431(9)(B)(i), and the Commission's press entity test.

**B. The *Weekly Briefing* is a part of PRI's legitimate press function.**

In *Massachusetts Citizens for Life*, the Supreme Court distinguished a special publication held to be a violation of the corporate spending ban from the organization's regular newsletter

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using five factors: facilities, staff, distribution, masthead, and numbering. The publication at issue in *MCFL*

was not published through the facilities of the regular newsletter, but by a staff which prepared no previous or subsequent newsletters. It was not distributed to the newsletter's regular audience, but to a group 20 times the size of that audience, most of whom were members of the public who had never received the newsletter. No characteristic of the Edition associated it in any way with the normal *MCFL* publication. The *MCFL* masthead did not appear on the flyer, and, despite an apparent belated attempt to make it appear otherwise, the Edition contained no volume and issue number identifying it as one in a continuing series of issues. 479 U.S. 238, 250-251.

As the complaint acknowledges, the *Weekly Briefing* is a weekly electronic newsletter. *Complaint* at 1. The content includes original reporting, informative news, opinion, and commentary, including calls to action. MUR 5928 at 5. "[T]he Commission has repeatedly stated that an entity that would otherwise qualify for the media exemption does not lose its eligibility because it ...expressly advocates<sup>3</sup> in its editorials the election or defeat of a federal candidate." *Id* at 6.

As noted above, the *Weekly Briefing* has been published continuously for over ten years. In contrast to the *MCFL* Special Edition, the edition cited in this complaint was published through the facilities of the regular newsletter, by the staff member who regularly prepared the newsletter, and was distributed to the newsletter's regular audience, not to a larger group. It was

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<sup>3</sup> See Note 2, *supra*.

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completely characteristic of a normal *Weekly Briefing*, using the normal masthead and colophon. The edition was designated as Volume 10, Number 46.<sup>4</sup>

As the Supreme Court noted, "it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications," preserving the distinctions required by 2 U.S.C. § 441b. *Id* at 251. Here, all five factors cited by the court for distinguishing campaign material from a regular publication are satisfied.

Because PRI is a qualified press entity and the *Weekly Briefing* is part of its legitimate press function, the newsletter is exempt from FECA regulation under the "press exemption.

**III. EVEN IF PRI'S WEEKLY BRIEFING WERE NOT OTHERWISE EXEMPT, THE COMPLAINT WOULD MERIT DISMISSAL DUE TO THE MINIMAL COST INVOLVED.**

The Commission has recognized that Internet communications normally involve minimal costs. Even before the Commission clarified that Internet communications are generally exempt from FECA restrictions and that Internet publications are eligible for the media exemption, the Commission recognized the minimal costs associated with Internet communications merited summary dismissal of a complaint. MUR 5491, *Jerry Falwell Ministries, et. al., Statement of Reasons of Chairman Thomas, Vice Chairman Toner and Commissioners Mason, McDonald, Smith and Weintraub* at 2; *Statement of Reasons of Chairman Thomas and Commissioner McDonald* at 1. Even when the Commission took the position that Internet communications were not generally exempt, the commission routinely dismissed complaints about Internet activity as a matter of prosecutorial discretion because spending was de minimus. *Id., Thomas-McDonald Statement* at 2, n. 2 (citing MURs 5474, 5579, 5522, 5281, and 4686).

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<sup>4</sup> Due to the complaint, solely as a precautionary measure, and without any concession as to its validity, PRI has temporarily removed Volume 10, Number 46, from the PRI web site. Current numbering runs from Number 45 (October 28, 2008) to Number 47 (November 6, 2008).

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The complaint concedes the very low dollar value of the publication. *Complaint* at 2. I spent only a few minutes composing the introduction and Mr. Mason spent approximately 2 hours composing the message and submitting it for transmission. Based on the salaries received from PRI the value of this time was no more than \$35.00. PRI spends approximately \$3000.00 on web hosting and e-mail, and the October 30 newsletter was one among hundreds of regular postings and e-mails from PRI.

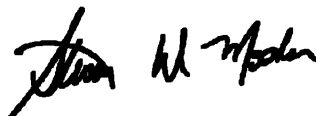
Even if the Commission were to find that the communication at issue is subject to FECA regulation and not exempt, the Commission should dismiss the complaint as a matter of prosecutorial discretion in light of the de minimus nature of the costs involved.

#### CONCLUSION

The Commission should find no reason to believe that PRI's October 30 *Weekly Briefing* violated the FECA. In the alternative, the Commission should dismiss the complaint due to the de minimus nature of the issues involved.

Far from making an example of PRI, as complainant urges, the Commission's imperative should be to clarify that Internet publishers such as PRI have the freedom to communicate with their own supporters (or those who purport to be supporters by voluntarily requesting for a newsletter) without fear of harassment or government investigation.

Sincerely,



Steven W. Mosher  
President